

Explanatory Statement

Civil Aviation Safety Regulations 1998

CASA EX90/23 — Design of Temporary Modifications or Repairs (Special Flight Permit) Instrument 2023

Purpose

The purpose of this instrument is to continue to allow an authorised person, or approved design organisation (*ADO*), to approve the design of a modification or repair of an aircraft which does not fully comply with all the applicable airworthiness standards in circumstances where the aircraft is to be operated under a special flight permit.

Legislation

Section 98 of the *Civil Aviation Act 1988* (the *Act*) empowers the Governor-General to make regulations for the Act and in the interests of the safety of air navigation. Relevantly, the Governor-General has made the *Civil Aviation Safety Regulations 1998* (*CASR*).

Certification and airworthiness requirements for aircraft and parts

Regulation 21.009 of CASR prescribes the approval of technical data for an aircraft, aircraft engine, propeller or appliance submitted to an authorised person or ADO, including where the technical data is submitted in connection with an application for a modification/repair design approval.

Subregulation 21.009(2) requires an authorised person or an ADO to approve the technical data for a modification/repair design approval if they are satisfied that the technical data demonstrates that the design complies with the applicable airworthiness standards for the instrument.

Subregulation 21.197(1) of CASR provides that a special flight permit may be issued for an aircraft that may not currently meet the applicable airworthiness requirements, but could reasonably be expected to be capable of safe flight for certain intended purposes. Special flight permits may only be issued for the limited purposes prescribed under that subregulation. These purposes include: flying the aircraft to a base where repairs are to be performed, delivering or exporting the aircraft, and dealing with emergencies.

Subpart 21.M of CASR relates to designs of modifications of, and repairs to, aircraft, aircraft engines, propellers and appliances and includes regulations 21.436 and 21.437.

Regulation 21.436 of CASR contemplates circumstances in which a proposed design for a modification or repair does not comply with applicable airworthiness standards and obliges an authorised person or an ADO assessing the application to follow specified procedures about whether the non-compliance is compensated for by factors that provide an equivalent level of safety.

Regulation 21.437 of CASR further prescribes matters relating to a grant of a modification/repair design approval by an authorised person or an ADO. Under subregulation 21.437(2), an authorised person or an ADO must approve an application for a modification or repair design if, among other matters, the design complies with the applicable airworthiness standards for the design.

Exemptions and directions

Subpart 11.F of CASR provides for the granting of exemptions from particular provisions of the regulations. Subregulation 11.160(1) of CASR provides that, for subsection 98(5A) of the Act, the Civil Aviation Safety Authority (**CASA**) may grant an exemption from compliance with a provision of the regulations.

Under subregulation 11.160(2) of CASR, an exemption may be granted to a person or a class of persons, and may specify the class by reference to membership of a specified body or any other characteristic.

Under subregulation 11.160(3) of CASR, an exemption may be granted on application by a person or on CASA's own initiative.

Under subregulation 11.175(4) of CASR, in deciding whether to reissue an exemption, CASA must regard as paramount the preservation of at least an acceptable level of aviation safety. CASA has regard to the same test when deciding whether to renew an exemption on its own initiative.

Regulation 11.205 provides that CASA may impose conditions on an exemption if necessary in the interests of the safety of air navigation. Under regulation 11.210, it is a strict liability offence not to comply with the obligations imposed by a condition.

Regulation 11.225 of CASR requires an exemption to be published on the internet. Under subregulation 11.230(1), the maximum duration of an exemption is 3 years.

Subpart 11.G of CASR provides for CASA to issue directions in relation to matters affecting the safety of air navigation. Under paragraph 11.245(1)(c) of CASR, CASA may, by instrument, issue a direction about any matter affecting the airworthiness of, or design standards for, aircraft. Subregulation 11.245(2) of CASR provides that CASA may issue such a direction if CASA is satisfied that it is necessary to do so in the interests of the safety of air navigation, if the direction is not inconsistent with the Act, and for the purposes of CASA's functions.

Under paragraph 11.250(a) of CASR, a direction under regulation 11.245 ceases to be in force on the day specified in the direction. Under regulation 11.255, it is an offence of strict liability to contravene a direction under regulation 11.245.

Background

Aircraft operators sometimes require approval of temporary modification/repair designs that do not meet applicable airworthiness standards to allow an aircraft to fly under the special flight permit provisions in regulation 21.197 of CASR.

In these situations, authorised persons and ADOs are asked to consider applications to approve the temporary modifications and repairs that do not comply with the applicable airworthiness standards.

CASA recognises that it is often not possible or practicable for an operator to demonstrate strict compliance with all applicable airworthiness standards in the case of temporary modifications or repairs associated with operations under a special flight permit.

Accordingly, CASA has previously exempted relevant persons from complying with the requirements in Subpart 21.M for designs for temporary modifications or repairs to comply with applicable airworthiness standards. The most recent instrument, *CASA EX98/20 — Design of Temporary Modifications or Repairs (Special Flight Permit) Instrument 2020 (CASA EX98/20)*, expired on 31 May 2023.

CASA is currently in the process of preparing regulatory amendments that would prescribe the intent of this exemption within CASR and drafting instructions to that effect have been provided to the Office of Parliamentary Counsel. However, finalisation of the proposed amendments to Part 21 has been delayed due to higher priorities in CASA's wider regulatory program.

Overview of instrument

The instrument allows an authorised person or ADO to approve the design of a modification or repair of an aircraft which does not fully comply with all the applicable airworthiness standards in circumstances where the aircraft is to be operated under a special flight permit.

CASA has assessed the proposal for the renewal of the exemption in CASA EX98/20 and is satisfied that the making this instrument will preserve an acceptable level of aviation safety.

Content of instrument

Section 1 of the instrument sets out the name of the instrument.

Section 2 of the instrument sets out the duration of the instrument, which commences on the day after it is registered and is repealed at the end of 31 August 2026.

Section 3 of the instrument states the subject matter to which the instrument applies, being the approval of a design, and of the technical data for the design, of temporary modifications or repairs that do not fully meet the applicable airworthiness standards for the design for subregulation 21.009(2) and regulation 21.437 of CASR.

Subsection 4(1) of the instrument sets out the scope of the exemption, the persons who are exempt and the circumstances in which the exemption applies. The exemption allows an authorised person or ADO (an **approver**) to approve the design of a modification or repair which does not fully comply with all the applicable airworthiness standards where the aircraft is to be operated under a special flight permit associated with that design and where an equivalent level of safety is not achieved.

Subsection 4(2) contains a condition on the exemption imposed by CASA under regulation 11.205 of CASR. It is a condition that an approver must take into account any relevant consideration relating to the safe operation of the intended flight, including all hazards and risks, before approving the design of temporary modifications or repairs.

Section 5 of the instrument contains directions issued by CASA under regulation 11.245 of CASR.

Under subsection 5(1) of the instrument, CASA directs the approver to impose limitations, conditions and requirements that are necessary in relation to the approval to ensure the safety of air navigation. The approver must identify any specific person who is required to comply with a limitation, condition or requirement. A person who is so identified by the approver

could be the applicant or another person who is required to do something in relation to the flight.

Under subsection 5(2), the approver must set out any such limitation, condition or requirement, and any person specified to comply with it, on the approval.

Under subsection 5(3), the approver is directed to reject the application if the approver is not satisfied that the aircraft, after it has been modified or repaired in accordance with the design, can reasonably be expected to be capable of safe flight for the relevant purpose mentioned in regulation 21.197 of CASR.

Subsection 5(4) includes a direction requiring a person who is subject to a limitation, condition or requirement to comply with the limitation, condition or requirement.

Legislation Act 2003 (the LA)

Paragraph 98(5A)(b) of the Act provides that the regulations may empower CASA to issue instruments in relation to matters affecting airworthiness of, or design standards for, aircraft. Additionally, paragraph 98(5B)(b) of the Act provides that an instrument issued under paragraph 98(5A)(b) is a legislative instrument if the instrument is, or relates to, an airworthiness standard. The instrument relates to airworthiness standards in relation to regulations 21.009 and 21.437 of CASR. The instrument is, therefore, a legislative instrument, and is subject to tabling and disallowance in the Parliament under sections 38 and 42 of the LA.

Sunsetting

Part 4 of Chapter 3 of the LA (the ***sunsetting provisions***) does not apply to the instrument, because the instrument relates to aviation safety and is made under CASR (item 15 of the table in section 12 of the *Legislation (Exemptions and Other Matters) Regulation 2015*).

However, this instrument will be repealed at the end of 31 August 2026, which will occur before the sunsetting provisions would have repealed the instrument if they had applied. Any renewal of the instrument will be subject to tabling and disallowance in the Parliament under sections 38 and 42 of the LA. Therefore, the exemption from sunsetting does not affect parliamentary oversight of this instrument.

Consultation

This instrument replaces instrument CASA EX98/20, which expired at the end of 31 May 2023. The operation of the exemption provided under instrument CASA EX98/20 has been satisfactory, and there have been no changes to the effect of the exemption provided under this instrument, which is beneficial to industry. Recent queries to CASA from industry have shown an ongoing practical need for the exemption to be renewed.

In these circumstances, it is CASA's view that it is not necessary or appropriate to undertake any further consultation under section 17 of the LA.

Sector risk, economic and cost impact

Subsection 9A(1) of the Act states that, in exercising its powers and performing its functions, CASA must regard the safety of air navigation as the most important consideration.

Subsection 9A(3) of the Act states that, subject to subsection (1), in developing and promulgating aviation safety standards under paragraph 9(1)(c), CASA must:

- (a) consider the economic and cost impact on individuals, businesses and the community of the standards; and
- (b) take into account the differing risks associated with different industry sectors.

The cost impact of a standard refers to the direct cost (in the sense of price or expense) which a standard would cause individuals, businesses and the community to incur. The economic impact of a standard refers to the impact a standard would have on the production, distribution and use of wealth across the economy, at the level of the individual, relevant businesses in the aviation sector, and the community more broadly. The economic impact of a standard could also include the general financial impact of that standard on different industry sectors.

As the instrument replaces an expired instrument with the same (or largely the same) provisions and conditions, there will be no change of economic or cost impact on individuals, businesses or the community.

Impact on categories of operations

The instrument is likely to have a beneficial effect on operations under a special flight permit by providing greater flexibility in the range of temporary modifications or repairs that can be applied to an aircraft before such operations commence.

Impact on regional and remote communities

The instrument is likely to have a beneficial effect on regional and remote communities inasmuch as any operations under special flight permits may take place in and around such communities.

Office of Impact Analysis (OIA)

An Impact Analysis (*IA*) is not required in this case, as the exemption is covered by a standing agreement between CASA and OIA under which an IA is not required for exemptions (OIA id: 14507).

Statement of Compatibility with Human Rights

The Statement of Compatibility with Human Rights at Attachment 1 has been prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. The instrument does not engage any of the applicable rights or freedoms, and is compatible with human rights, as it does not raise any human rights issues.

Making and commencement

The instrument has been made by a delegate of CASA relying on the power of delegation under subregulation 11.260(1) of CASR.

The instrument commences on the day after it is registered and is repealed at the end of 31 August 2026.

Statement of Compatibility with Human Rights

*Prepared in accordance with Part 3 of the
Human Rights (Parliamentary Scrutiny) Act 2011*

CASA EX90/23 — Design of Temporary Modifications or Repairs (Special Flight Permit) Instrument 2023

This legislative instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the legislative instrument

The legislative instrument allows an authorised person, or approved design organisation (*ADO*), to approve the design of a modification or repair of an aircraft which does not fully comply with all the applicable airworthiness standards in circumstances where the aircraft is operating under a special flight permit.

A condition and directions in the instrument ensure that an authorised person, or ADO, takes into account any relevant consideration relating to the safe operation of the intended flight before approving the design of temporary modifications or repairs, and that appropriate safety limitations and conditions are placed on an approval and complied with.

Human rights implications

This legislative instrument does not engage any of the applicable rights or freedoms.

Conclusion

This legislative instrument is compatible with human rights as it does not raise any human rights issues.

Civil Aviation Safety Authority